Office - Supreme Court, U.S.
FILED
FEB 17 1984
ALEXANDER L. STEVAS,
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No. 83-1154

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MOUNT AIRY LODGE, INC.,
Petitioner

v.

THE UPJOHN COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Where a jury, in response to special verdict interrogatories submitted under Rule 49(a) of the Federal Rules of Civil Procedure, returns findings of fact which uniformly preclude recovery on each of plaintiff's three legal theories, and where the jury is not asked to determine or award compensatory damages (the amount of plaintiff's loss having been stipulated to), and where the jury makes no such award, and where the jury is thereafter discharged with a general verdict being entered by the trial judge in defendant's favor, may members of the jury later be allowed to impeach their special verdict by testifying that they misapprehended the legal consequences of their fact findings and that the entire jury had believed and assumed plaintiff would receive its damages?

2. Has the United States Court of Appeals for the Fifth Circuit adopted a *per se* rule of decision on special verdict inconsistency under which a jury's uniformly negative responses to liability interrogatories must always be deemed irreconcilably inconsistent with an affirmative award of damages, or do the cases upon which Petitioner relies instead demonstrate that no such rule exists, in which event there is no conflict whatsoever among the courts of appeals?

3. Under the Seventh Amendment and Rule 49 of the Federal Rules of Civil Procedure, is not a general verdict properly entered in defendant's favor where the jury, in response to special verdict interrogatories, has found facts which uniformly preclude liability under each of plaintiff's three legal theories, although the jury may have misapprehended the legal consequences of its fact findings and may have incorrectly assumed that the plaintiff would be the verdict winner?

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STATEMENT OF THE CASE

This is a products liability action brought by Mount Airy Lodge, Inc. ("MAL"), and its subrogated insurers, to recover damages for the fire loss of MAL's laundry building on January 25, 1978. Jurisdiction was based on diversity of citizenship and the case was tried under Pennsylvania law.

MAL contended that the fire loss of its laundry building was caused by the presence of exposed polyurethane foam insulation on the interior walls of the structure. MAL had purchased its polyurethane foam components from The Upjohn Company ("Upjohn")[1] at various times during the years 1972 through early 1976. The foam insulation was applied in a number of areas throughout MAL's resort complex during this period. The application of the product was done by MAL, itself, using special equipment it purchased for this purpose, and using its own employees, one of whom was an experienced spray foam applicator.[2]

The flammability characteristics of polyurethane foam insulation are such that a cementitious protective covering ("thermal barrier") must be applied over the product where it is used to insulate the interior surfaces of walls and ceilings.

MAL's basic contention in this case was that Upjohn failed to warn it of the flammability characteristics of polyurethane foam insulation, including the need for thermal barriers in interior applications. MAL further claimed that the presence of exposed foam insulation in

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1. In accordance with Rule 28.1, the subsidiaries and affiliates of The Upjohn Company have been identified in the Appearance Form filed on Upjohn's behalf in this matter.

2. Spray polyurethane foam insulation consists of two liquid components which are sold, in bulk, in separate 55 gallon drums. The product is applied by a contractor/applicator through the use of a spray gun apparatus which mixes the two components and then "shoots" the resulting mixture onto the surface to be insulated. This mixture "foams up" much like shaving cream, cures and eventually becomes rigid.

the laundry building caused what would otherwise have been a relatively small fire to become a major conflagration resulting in the total loss of the structure and its contents.

MAL asserted its "failure to warn" claim under three separate theories of liability, namely negligence, strict products liability and misrepresentation. Damages, in the approximate amount of $1,200,000, were sought for the fire loss of the laundry building and its contents. In addition, MAL asserted a claim for punitive damages based on Upjohn's alleged misrepresentation of its product.

The case was tried to a jury over the course of four weeks in October of 1982, the Honorable Louis H. Pollak presiding. Contrary to the conclusory assertions made in MAL's petition, there was substantial and diametrically opposed evidence presented on the question whether MAL had been warned by Upjohn or others of the flammability characteristics of polyurethane foam insulation prior to the fire loss. The question whether exposed foam was a substantial factor in the loss of the laundry building also was hotly contested. Upjohn presented extensive expert testimony that, due to the burning of huge quantities of linen, the fire loss would have occurred even if exposed foam had not been present in the laundry building.

On October 28th, the case was submitted to the jury for a special verdict based on 13 interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure.[3]

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3. The interrogatories as submitted were, with the exception of several stylistic changes, those proposed by MAL. (A1-A9) A covering memorandum drafted by the trial court was added to the special verdict form. (A1) MAL's interrogatories, as adopted by the trial court, instructed the jury to answer the two damage interrogatories, Nos. 12 and 13, irrespective of whether or not the jury's responses to the preceding liability interrogatories would have allowed a general verdict to be entered against Upjohn. (A4) At the same time, the trial court's covering memorandum instructed the jury to go on to the damage interrogatories only if its prior answers would permit liability to be imposed. (A1) MAL made no objection to this inconsistency in instructions.

The jury returned its special verdict on October 29th. With respect to MAL's claims for negligence and strict products liability, the jury found in response to Interrogatory Nos. 2 and 7 that causation was lacking. As regards misrepresentation, the jury concluded in response to Interrogatory No. 10 that reliance was lacking. (A1-A5)

The jury foreman, Mr. Langevoort, read the jury's responses into the record and the jury was thereafter individually polled by Judge Pollak, with each juror affirming that the answers as announced by the foreman were his or her own. (A10-A13) The special verdict was then accepted by the trial court and the jury was discharged with a general verdict being entered in favor of Upjohn. (A12-A13)

Shortly after these events transpired, plaintiff's counsel notified the trial court and counsel for Upjohn that a "mistake" had been made in the jury's deliberations. A conference was held in chambers at which time MAL's counsel represented that two jurors had approached him with congratulations on MAL's victory and were, in turn, surprised to learn that Upjohn was the verdict winner. (A14-A15)[4] MAL's counsel further represented that these two jurors believed the entire jury expected MAL would receive its compensatory damages, which had been stipulated in the amount of $973,000, notwithstanding the jury's contrary responses to the special verdict interrogatories.[5]

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4. Subsequent events disclosed that it was MAL's counsel who accosted the two jurors and not the two jurors who initiated this conversation. (A16-A18)

5. MAL also argued that a "mistake" was shown by the fact that the special verdict form, which had not previously been examined by the court and counsel, revealed that the jury had entered a "No" answer to Interrogatory No. 13 on punitive damages. MAL contended that this entry furnished some objective evidence that the jury had gone beyond the liability questions to consider damages. This argument, of course, ignored the instructions on the special verdict form which MAL drafted and which *required* the jury to go on to the damage questions irrespective of their prior answers to

Acknowledging the force of Rule 606(b) of the Federal Rules of Evidence, Judge Pollak declined MAL's suggestion that he immediately take testimony from the two jurors and instead requested briefs on the propriety of any post-verdict interrogation.

Oral argument on MAL's motion to reconvene the jury was heard on November 10th and was followed by the trial court's Memorandum Opinion of November 19, 1982 in which Judge Pollak held that he could recall the jury, notwithstanding Rule 606(b), solely for the very limited purpose of determining whether there had been some "clerical error" in the transmission of the special verdict responses from jury room to courtroom. *See generally* 3 J. Weinstein & M. Berger, *Weinstein's Evidence* §606[04] at 606-32 (1982).[6]

The trial court thereafter recalled the two jurors who had spoken with MAL's counsel, Messrs. Jackson and Calabro, and Mr. Langevoort, the jury foreman. Judge Pollak first interviewed Mr. Langevoort and specifically asked him whether the jury's responses to each of the special verdict interrogatories were those announced in open court. Mr. Langevoort's testimony showed that there had been no "clerical error" in the rendition of the jury's special verdict findings. The findings announced in court were those agreed upon in the jury room. Mr. Langevoort also testified that the jury assumed MAL would receive $973,000 in compensatory damages, thus demonstrating that the jury had simply misapprehended the legal consequences which would flow from its fact findings. (A19-A26)

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the liability questions. MAL's argument was made even more attenuated by the fact that the jury had no need to make any findings at all in response to Interrogatory No. 12 on compensatory damages. The parties previously had stipulated to compensatory damages in the amount of $973,000 and the court had entered this figure on the special verdict form at Interrogatory No. 12 prior to submission of the case to the jury.

6. The trial court's Memorandum Opinion of November 19, 1982 has been reported. *Mount Airy Lodge, Inc. v. The Upjohn Company*, 96 F.R.D 378 (E.D. Pa. 1982).

In Judge Pollak's view, the interrogation of Mr. Langevoort, for all practical purposes, ended the case:

> The predicate in my judgment for this morning's hearing was the possibility that what was reported by Mr. Langevoort in court and embodied in writing in the Answers to Interrogatories did not correspond with what the jury actually voted. To pursue that inquiry I conducted this hearing, insofar as it has reached Mr. Langevoort, in the face of defendant's position that any inquiry was foreclosed by Rule 606(b). I thought inquiry was permissible under the Weinstein & Burger [sic] dictum that the rule "would not bar testimony by a juror that all the jurors agree through inadvertence, oversight or mistake the verdict announced was not the verdict on which agreement had been reached."
>
> I think what Mr. Langevoort has testified to in response to the questions I put forecloses a determination "that all jurors agree that through inadvertence, oversight or mistake the verdict announced was not the verdict on which agreement had been reached."
>
> Having reached that judgment, I don't think that further inquiry by me alone, or by me with counsel, into the deliberations of the jury would be proper.

(A27-A28) Judge Pollak did thereafter interview Messrs. Calabro and Jackson. However, he did so, not for the purpose of impeaching the verdict, but simply so that MAL would have a record of counsel's *ex parte* conversation with the two jurors on appeal. (A28) On the merits, Judge Pollak held that the jury's responses to the special verdict interrogatories were not irreconcilably inconsistent but instead, at most, demonstrated a misapprehension of the manner in which the court would apply the law to the jury's fact findings. Under Rule 49(a), application of the law to the facts found by the jury was for the court; the jury in this case had not been asked to

render a general verdict in favor of either one of the parties. Judge Pollak accordingly held that the jury's "mistake" was irrelevant and was not inconsistent with its fact findings under which liability was foreclosed, and, therefore, entered final judgment in Upjohn's favor. (A27-A31)

The verdict for Upjohn was affirmed on appeal, without opinion, by Judgment Order of September 22, 1983. MAL's Petition for Rehearing En Banc was denied, also without opinion, on October 17, 1983 and the instant certiorari petition followed on January 13, 1984.

SUMMARY OF ARGUMENT

In nominal compliance with Rule 17.1(a) of the Supreme Court Rules, MAL has sought to bottom its certiorari petition on the existence of a conflict between the decision of the United States Court of Appeals for the Third Circuit ("Third Circuit") in this matter and several decisions of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") on what qualifies as an irreconcilable inconsistency for purposes of Rule 49 of the Federal Rules of Civil Procedure. In point of fact, the perceived conflict is contrived if not chimerical; it is the product of MAL's mischaracterization of the record in this case and MAL's over-broad and incomplete reading of the Fifth Circuit cases; and it is of no precedential import whatsoever.

The essence of MAL's argument appears to be as follows: (i) the jury in this case "adopted" the stipulated compensatory damage figure which had been entered by the trial court on the special verdict form at Interrogatory No. 12; (ii) the "adopted" award constituted a general verdict in MAL's favor which was, in turn, inconsistent with the jury's preceding answers under which liability was foreclosed; (iii) the Third Circuit erred in finding no inconsistency between the two; and (iv) the Third Circuit's decision conflicted with a "*per se*" rule developed by the Fifth Circuit under which damage

awards are always deemed to be "irreconcilably inconsistent" with negative findings on liability.

There are a number of flaws in MAL's argument, not the least of which is that the first of its predicate assumptions is wrong. There is no competent evidence in this case that the jury "awarded" MAL anything. Instead, MAL's "adoption" argument is based in its entirety on post-verdict juror impeachment testimony which is incompetent and inadmissible under Rule 606(b) of the Federal Rules of Evidence. The only materials properly before the Court of Appeals were the special verdict form, the verdict as announced by the jury foreman and the report of the polling of the jury in open court which followed. Since these materials present no inconsistency whatsoever, MAL's argument falls of its own weight.

Second, the contention that the Fifth Circuit has adopted a *"per se"* rule under which a jury's damage award always must be deemed "irreconcilably inconsistent" with negative answers on liability, thereby precluding the entry of a defendant's verdict, finds no support in the decisions cited by MAL and, in fact, is directly contradicted by one of those cases. Other decisions of the Fifth Circuit demonstrate that the supposedly *"per se"* rule urged by MAL simply does not exist.

Third, even if MAL is given the benefit of the jury's adoption of Interrogatory No. 12, and even if that "award" is treated as a general verdict in MAL's favor, the fact remains that the trial court properly entered a general verdict for Upjohn based on the jury's otherwise internally consistent answers to the liability questions. Rule 49 expressly provides for this procedure, the decisions of both the Third Circuit and Fifth Circuit endorse it and the Seventh Amendment requires it.

ARGUMENT

I. Certiorari should be denied because there is no competent evidence that the jury awarded Petitioner its damages; therefore, there was no inconsistency in the verdict whatsoever and no potential conflict between the Third Circuit's decision below and the decisions of the Fifth Circuit on special verdict inconsistency.

MAL's argument for certiorari is a house of cards built upon the contention that the jury "adopted" the pre-printed answer to Interrogatory No. 12; that the jury's "adoption" of the stipulated compensatory damage figure constituted a general verdict in MAL's favor for $973,000; and that this general verdict was, in turn, irreconcilably inconsistent with the jury's preceding responses on liability which uniformly precluded any award in MAL's favor.

The short answer to MAL's argument is that there is no competent evidence whatsoever of inconsistency in the jury's verdict. To the contrary, MAL's inconsistency argument is based in its entirety on post-verdict juror impeachment testimony which is incompetent and inadmissible under Rule 606(b) of the Federal Rules of Evidence.

The rule against impeachment of a verdict through the post-verdict testimony of a juror originated with Lord Mansfield's decision in *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785), and was firmly established by this Court as a matter of federal law in *McDonald v. Pless*, 238 U.S. 264, 267-68(1915). The rule has been summarized by Professor Wigmore as follows:

> [A]fter the verdict has been pronounced by the jury and accepted by the judge and the jury has been discharged, the verdict is final as regards its meaning and effect. Hence, *no statements by the jurors*, either unanimously or individually, can be resorted to for *explaining or changing its meaning or legal effect*.

VIII *Wigmore on Evidence* §2356 at 723 (McNaughton rev. 1961).[7] The policy considerations upon which this rule is founded are self-evident and the soundness of the rule has never been open to serious dispute:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation — to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. at 267-68 (affirming trial court's refusal to consider juror affidavit that a quotient verdict had been rendered).

Rule 606(b) of the Federal Rules of Evidence codified the common law rule against impeachment of a verdict as follows:

> *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or

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7. The rule against impeachment extends to partial as well as final verdicts so that a jury member, even if still empanelled, will not be heard to recant his assent to a finding previously made by the jury and accepted by the court. *See, e.g., United States v. Hockridge*, 573 F.2d 752, 756-60 (2d Cir. 1978) (trial court properly rejected two jurors' efforts, in the midst of deliberations, to impeach a partial verdict previously announced by the jury; trial court would have erred had the jurors been permitted to reconsider their consent to the partial verdict), *cert. denied*, 439 U.S. 821 (1979).

> statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The legislative history of Rule 606(b) is revealing in that it demonstrates Congress' considered decision to prohibit verdict impeachment testimony in *all* cases other than those where some extraneous, outside influence was brought to bear on the jury's deliberations. As finally enacted by Congress, Rule 606(b) mirrored this Court's original proposal. However, this version was adopted only after Congress had considered the House Judiciary Committee's proposal that jury deliberations be opened to review for objective instances of misconduct and other irregularities occurring in the jury room. The Senate Judiciary Committee rejected the House proposal, reinstated Rule 606(b) as originally promulgated by this Court, and that version was ultimately accepted by the Conference Committee. *See* Rules of Evidence, Pub. L. No. 93-595, 1974 U.S. Code Cong. & Ad. News 7051-7112; *see also* 10 J. Moore & H. Bendix, *Moore's Federal Practice* §606.01 (1982).

The importance which this Court and the Congress have attached to the exclusion of post-verdict juror impeachment testimony is clear. It is equally apparent that this rule renders incompetent and inadmissible the very post-verdict impeachment testimony upon which MAL bases its inconsistency argument in this case. A number

of decisions squarely support the rule that jurors may not impeach their verdict through testimony that they were mistaken as to the legal consequences of their fact findings. *See, e.g., Hendrix v. United States*, 219 U.S. 79, 91 (1911); *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982); *Brewer v. Jeep Corp.*, 546 F. Supp. 1147 (W.D. Ark. 1982); *Vizzini v. Ford Motor Co.*, 72 F.R.D. 132 (E.D. Pa. 1976), *vac. on other grounds*, 569 F.2d 754 (3d Cir. 1977).

Under the foregoing authorities, the only materials which properly were before the Court of Appeals were the special verdict form, the verdict findings as reported by the jury foreman and the report of the polling of the jury in open court which followed. These materials, of course, presented no inconsistency whatsoever but instead were uniformly supportive of the general verdict entered in Upjohn's favor. There being no inconsistency, MAL's argument for certiorari falls of its own weight and should, therefore, be denied.

II. Petitioner's claim that certiorari should be granted because of a conflict between the Third Circuit's decision below and several decisions of the Fifth Circuit is illusory; the Fifth Circuit has never adopted a *per se* rule under which negative answers to liability interrogatories, in conjunction with an affirmative award of damages, constitute irreconcilably inconsistent answers to special verdict interrogatories precluding the entry of a general verdict in the defendant's favor.

Citing the decisions in *Nordmann v. National Hotel Co.*, 425 F.2d 1103 (5th Cir. 1970), and *Griffin v. Matherne*, 471 F.2d 911 (5th Cir. 1973), MAL contends that "the Fifth Circuit Court of Appeals has adopted a *per se* rule whereby negative answers to liability inter-

rogatories in conjunction with an affirmative award of damages constitute irreconcilably inconsistent answers to special verdict interrogatories, precluding the entry of judgment based upon such answers." Petition for Certiorari at pp. 22-23. MAL bottoms its petition upon a perceived conflict between this "*per se*" rule of decision and the Third Circuit's purportedly contrary holding in the instant matter.[8] This conflict is neither apparent nor real but, instead, has been manufactured in a transparent attempt to justify the filing of a certiorari petition in what is otherwise a routine and unexceptional diversity case. Even a cursory reading of the authorities cited by MAL, together with several other Fifth Circuit decisions, demonstrates that there is no conflict among the courts of appeals for the simple reason that the "*per se*" rule upon which MAL so heavily relies does not exist.

The question presented in *Nordmann v. National Hotel Co.* was whether the trial court had abused its discretion in resubmitting to the jury for clarification, prior to its discharge, special verdict interrogatory answers. When first returned to the trial court, the interrogatory as to defendant's negligence had been answered in both the affirmative and the negative. The second interrogatory as to causation reflected only an erasure of uncertain import. These indecipherable entries rendered the jury's responses to the special verdict interrogatories inconsistent among themselves and potentially inconsistent with the damage interrogatories if the latter were viewed as returning a general verdict in the plaintiffs' favor. The Fifth Circuit held that there had been no

8. This argument, of course, assumes that the Third Circuit considered the post-verdict testimony on the jury's "adoption" of Interrogatory No. 12 but concluded there was no irreconcilable inconsistency between the jury's liability responses and the "adopted" damage award. However, it is equally likely that the Court of Appeals simply refused to consider the incompetent impeachment testimony of the three jurors, in which event there is no inconsistency whatsoever in the verdict.

abuse of the trial court's discretion in resubmitting the interrogatories to the jury for clarification.[9]

From the foregoing summary, it should be apparent that *Nordmann* did not involve a fact pattern in which internally consistent responses to special verdict interrogatories on liability were claimed to be in conflict with a contrary general verdict consisting of a damage award in plaintiff's favor. The liability responses in *Nordmann* were *internally inconsistent* and, in such situations, Rule 49(b) expressly authorizes the trial court to resubmit the interrogatories to the jury.

By way of contrast, the instant case did not involve internally inconsistent special verdict fact findings but instead presented responses, under three separate theories of liability, which were uniformly in Upjohn's favor.[10]

The decision in *Griffin v. Matherne* is likewise distinguishable because it too involved internally inconsistent findings on liability. The jury in *Griffin* found one of three defendants, National Lead, was negligent; that National Lead's negligence had not caused plaintiff's injuries; that there should be an apportionment of fault between plaintiff and "the other parties"; that National

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9. It bears mention that the instant case does not involve the question of a trial court's discretionary authority under Rule 49 of the Federal Rules of Civil Procedure to resubmit seemingly inconsistent interrogatory answers to a jury for clarification prior to its discharge. Instead, the issue here was whether the jury's findings, having been received and accepted, and the jury having been discharged, could be reconciled under compulsion of the Seventh Amendment. *See infra* pp. 17-19. This distinction alone renders the *Nordmann* case inapposite.

10. This Court has not hesitated to decline certiorari where a full analysis of the facts of the decisions in question demonstrates that the courts of appeals are not in conflict. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923); *see also* Harlan, *Manning v. Dikes*, 13 Rec. A.B. City N.Y. 541, 552 (1958) ("[D]ifferences between the Courts of Appeals in two or more circuits will not be accepted as a conflict if they can be fairly accounted for on the basis of variations in the factual situations among the cases involved.").

Lead was guilty of passive rather than active negligence; and that plaintiff had suffered damages. There were thus clear internal inconsistencies in the special verdict fact findings on liability and those findings were, in turn, also inconsistent with the jury's response on damages if the latter was deemed a general verdict for the plaintiff.

MAL's assertion that *Griffin* established a "*per se*" rule under which negative findings on liability are always deemed to be "irreconcilably inconsistent" with an award of damages reaches too far and, in fact, is disproved by the Fifth Circuit's opinion in the case. As noted above, *Griffin* involved three defendants. A new trial was ordered only as to National Lead. The trial court's entry of a general verdict in favor of the other two defendants was affirmed on appeal. With respect to these parties, the Fifth Circuit found that the special verdict responses on liability presented no internal inconsistencies. Instead, the only arguable inconsistency was the conflict between the findings of no liability and the award of damages. The Fifth Circuit held that this was not an "irreconcilable inconsistency" precluding entry of a general verdict in favor of the two other defendants, thus demonstrating that the "*per se*" rule of decision on which MAL bases its claim of conflict between the circuits does not exist.

Several other Fifth Circuit decisions confirm the non-existence of this supposed "*per se*" rule of decision. In *Nimnicht v. Dick Evans, Inc.*, 477 F.2d 133 (5th Cir. 1973), a maritime personal injury action, the jury returned special verdict findings on liability which precluded a plaintiff's verdict but then went on to answer the damage interrogatory with an award in plaintiff's favor in the amount of $13,500. On appeal, plaintiff contended that the jury's responses were irreconcilably inconsistent. The Fifth Circuit disagreed and affirmed the trial court's entry of a general verdict in defendant's favor. Plaintiff had shown only an inconsistency between special verdict responses on liability and the damage award (if viewed as a contrary general verdict). Un-

der Rule 49(b), the Fifth Circuit held that a general verdict could be entered on the basis of the uniformly consistent liability responses, notwithstanding the contrary damage award. The language used by the Court of Appeals is equally applicable to MAL's argument in the instant matter:

> We are of the opinion that those findings [on liability] left the District Court with no room to adopt any other course. In the absence of unseaworthiness or negligence, damages could not be awarded. The jury should not have responded to Interrogatory No. 11 [on damages]. The fact that it mistakenly did so could not change the answers to the prerequisite questions, upon which any damages at all had to live or die.

477 F.2d at 135.

To similar effect is the Fifth Circuit's decision in *Gallimore v. Missouri Pac. Railroad Co.*, 635 F.2d 1165 (5th Cir. 1981). This was an FELA action brought by plaintiff against defendant railroad ("MoPac") for injuries sustained during the course of his employment. The case was tried to a jury with special verdict interrogatories being submitted at the conclusion of the evidence. The jury responded that MoPac was not negligent, that plaintiff was negligent, that plaintiff's negligence was 80% responsible for his injuries and that the sum of $60,000 was fair compensation for those injuries. Plaintiff argued that these responses were inconsistent and therefore that a new trial should be granted. The trial court agreed and a second jury was empanelled. As a result of the second trial, plaintiff obtained findings that MoPac *was* negligent, that plaintiff's contributory negligence was 50% and that plaintiff's damages were in the amount of $390,000. MoPac thereupon filed a motion for judgment n.o.v. arguing, *inter alia*, that a general verdict should have been entered in its favor on the basis of the first jury's findings of fact. MoPac's motion was granted, the trial court accepting the first jury's

findings and entering final judgment in MoPac's favor. Plaintiff appealed this ruling with the issue being whether the first jury's responses were, in fact, inconsistent. As in *Nimnicht*, the Fifth Circuit held that the fact findings on liability in the first trial supported an entry of judgment in defendant's favor notwithstanding that the jury had purported to make an affirmative award of damages.

The decisions in *Nimnicht* and *Gallimore*, as well as the decision in *Griffin*, all demonstrate that the Fifth Circuit has never adopted a "*per se*" rule under which negative answers to liability interrogatories are deemed to be irreconcilably inconsistent with an affirmative award of damages. This being so, certiorari should be denied because the imagined conflict upon which MAL has based its petition does not exist.

III. Because Petitioner has failed to demonstrate any conflict between the courts of appeals or any other special and important reason for review, and in light of the fact that the decision below was undoubtedly proper under both the Seventh Amendment and Rule 49 of the Federal Rules of Civil Procedure, certiorari should be denied.

The foregoing discussion demonstrates that this case does not involve a conflict between the courts of appeals, much less a conflict which should be resolved by this Court for some special and important reason.[11] This

11. MAL's argument that a conflict exists between the Third Circuit's decision below and its decision in *Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553 (3d Cir. 1983), adds nothing to the merits of the petition. As in *Griffin* and *Nordmann*, the *Stanton* case involved internally inconsistent findings on liability. *Stanton* also dealt with an issue not presented here, namely whether the trial court abused its discretion in resubmitting seemingly inconsistent answers to the jury for clarification prior to its discharge. Moreover, even were there some conflict between *Stanton* and the instant case, this Court has squarely held that the reconciliation of decisions within a circuit should be left to the courts of appeals. *Wisniewski v. United States*, 353 U.S. 901 (1957).

is instead a routine and unexceptional diversity case which presents no meaningful questions of federal law and which has been fully reviewed for error in both the trial court and on appeal to the Third Circuit. These reasons alone justify denial of MAL's certiorari petition. Moreover, certiorari also should be denied because the decision below was undoubtedly correct under both the Seventh Amendment and Rule 49 of the Federal Rules of Civil Procedure.

Pursuant to this Court's decision in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 364 (1962), "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." To fail to do so, and to instead search for the one possible view of the case under which a jury's findings are inconsistent "results in a collision with the Seventh Amendment." *Id.* A court is free to disregard a jury's findings and to order a new trial only if those findings are totally irreconcilable, even by exegesis. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963); *accord, Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 292-93 (3d Cir. 1980); *Griffin v. Matherne*, 471 F.2d at 915.

MAL's argument that the jury "adopted" the stipulated compensatory damage figure of $973,000 which had been inserted in Interrogatory No. 12 and that this response constituted a general verdict which was, in turn, inconsistent with the jury's contrary responses to the preceding liability interrogatories does not present an "irreconcilable inconsistency" within the meaning of the foregoing authorities.

Precisely the same situation was presented to the Third Circuit in *Halprin v. Mora*, 231 F.2d 197 (3d Cir. 1956). *Halprin* was a plaintiff's appeal from the trial court's entry of a defendant's verdict in a wrongful death action. The case was submitted to the jury on special

verdict interrogatories which were responded to as follows:

> 1. Was there any negligence on the part of [defendant] Mr. Mora which was a substantial factor in bringing about the accident? No.
>
> 2. Was there any negligence on the part of [defendant] Mr. Davis which was a substantial factor in bringing about the accident? No.
>
> 3. What amount do you award as damages to the boy's mother? A thousand dollars.
>
> 4. What amount do you award as damages to the administratrix of the boy's estate? Ten thousand dollars.

231 F.2d at 200. Plaintiff argued on appeal that these responses were irreconcilably inconsistent and, therefore, that the trial court improperly entered a general verdict in the defendants' favor. The Court of Appeals disagreed and explained its reasoning as follows. If regarded as special verdict findings of fact under Rule 49(a), the jury's award of damages under Interrogatory Nos. 3 and 4 was not inconsistent with its responses to the liability questions because the damage interrogatories asked only for a valuation of plaintiff's loss, not an assessment of liability against either one of the defendants. *Id.* at 201. Alternatively, and even if the damage responses were regarded as a contrary general verdict under Rule 49(b), the trial court still could enter a general verdict for the defendants on the basis of the jury's findings on liability:

> This is so because, under Rule 49(b), when a general verdict is accompanied by special interrogatories, such as we have here in questions one and two, the court may consider the special verdict controlling.

Id. at 201.

The *Halprin* decision conclusively demonstrates that Judge Pollak properly entered a general verdict in Upjohn's favor in this case. First, assuming *arguendo* that the jury "adopted" the stipulated response to Interrogatory No. 12, the fact is that this question asked only for a valuation of MAL's losses and did not ask the jury to assess liability against Upjohn. As in *Halprin*, Judge Pollak could properly have so regarded it and thus found no inconsistency with the jury's prior responses on liability. Second, even if MAL is given the benefit of the jury's "adoption" of Interrogatory No. 12, and even if that response is regarded as a general verdict for MAL, the fact remains that Judge Pollak, as in *Halprin*, was authorized to enter a defendant's verdict in light of the jury's otherwise internally consistent responses to the liability questions. Under Rule 49(b), where there are inconsistencies between a general verdict and the jury's responses to special interrogatories, the latter prevail.[12]

In the final analysis, the essence of MAL's argument is that the jury misapprehended the legal consequences of its fact findings and that, had the jury known those consequences, it would have revised its findings so as to reach the desired outcome of the case. The impropriety of this reasoning is clear. One of the primary purposes of the special verdict system is to guard against just such contrived, "result-oriented" fact finding.[13]

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12. The Fifth Circuit reached exactly the same result in *Nimnicht v. Dick Evans, Inc.*, discussed *supra* pp. 14-15. *See also McCollum v. Stahl*, 579 F.2d 869, 871 (4th Cir. 1978), *cert. denied*, 440 U.S. 912 (1979); *Black v. Riker-Maxson Corporation*, 401 F. Supp. 693 (S.D.N.Y. 1975); *Harris v. Hercules, Inc.*, 328 F. Supp. 360 (E.D. Ark. 1971), *aff'd*, 455 F.2d 267 (8th Cir. 1972); *Minneapolis, Northfield & S. Ry. Co. v. Skyway Aviation Corp.*, 32 F.R.D. 1 (D. Minn. 1963), *aff'd*, 326 F.2d 701 (8th Cir. 1964).

13. "[A] jury in making special findings is best directed not to concern themselves about whether their answers will be favorable to one party or the other or what the final result of the lawsuit may be." *Chicago, Rock Island & Pacific Railroad Co. v. Speth*, 404 F.2d 291, 295 (8th Cir. 1968); *accord, Thedorf v. Lipsey*, 237 F.2d 190,

Special verdicts ensure that justice is done by preserving the most fundamental concept of the jury trial, *i.e.*, that issues of law are to be resolved by the court and issues of fact are for the jury. Special verdicts thus provide a measure of protection against awards made out of passion, prejudice or sympathy for one of the litigants. The court is provided with what are, as far as possible, objective fact findings on which liability turns and can then apply the law to those findings in entering a general verdict. This is the principal strength of the special verdict system. *See Skidmore v. Baltimore & O. R. Co.*, 167 F.2d 54 (2d Cir. 1948) (per Frank, J.), *cert. denied*, 335 U.S. 816 (1948).[14]

MAL's plea of "mistake" ignores these principles and would deny Upjohn the protections secured to it under the Seventh Amendment. The jury in this case found facts, under each of MAL's three separate legal theories, which uniformly precluded liability. That the jury may have been mistaken as to whether the law would allow recovery on those facts is irrelevant. Under the Seventh Amendment, Rule 49 of the Federal Rules of Civil Procedure, and the decisions of both the Third and Fifth Circuits, a general verdict was properly entered in Upjohn's favor. Accordingly, certiorari should be denied.

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193 (7th Cir. 1956); *Ruddy v. New York Central Railroad Company*, 124 F. Supp. 470, 472 (N.D.N.Y. 1954) ("[T]he design of the special verdict procedure is to obtain answers to questions of fact with the knowledge of the jury limited as to whether its findings will favor one side or the other"), *rev'd on other grounds*, 224 F.2d 96 (2d Cir. 1955), *cert. denied*, 350 U.S. 884 (1955).

14. Judge Frank's comprehensive review of the special verdict procedure in *Skidmore* demonstrates the value of interrogatories in avoiding the sometimes capricious results of the jury trial system. On another occasion, Judge Frank noted the view that the "worst evils of the jury system can be avoided by abolishing general verdicts and restricting verdicts to fact finding verdicts, in which the jury merely finds the constitutive 'facts', leaving it to the judge thereafter to apply the law to the facts thus found." J. Frank, *Law and the Modern Mind* at 192 (1963).

CONCLUSION

For all the foregoing reasons, Upjohn respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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Appendix

A1

SPECIAL VERDICT FORM

October 29, 1982

Memorandum to the Jury
Re: *Attached Interrogatories*

When you have completed your deliberations, you will record on the attached interrogatories your unanimous answers. Those answers will constitute your decision in this case. When you have finished recording your answers to the interrogatories, you will inform me, via the marshal, that you have reached a verdict. I will then so advise the attorneys. As soon as the attorneys and I are in the courtroom, you will come in, bringing the attached interrogatories, and your answers to the interrogatories will be read out loud.

Interrogatories 1 through 11 ask you to make findings about each of the three separate - alternative theories of liability (Negligence; Strict Liability; and Misrepresentation) presented by plaintiff in this case. Interrogatories 12 and 13 ask you to make findings about damages. You will not answer the damages interrogatories unless you find the defendant liable to the plaintiff on at least one of the three theories of liability. Specifically, this means that you should answer the damages interrogatories if, but only if:

1. You have answered "NO" to interrogatory 3 or 4; *or*

2. In answering interrogatory 5 you have attributed to plaintiff an amount of negligence less than 51 per cent; *or*

3. You have answered "NO" to interrogatory 8; *or*

4. You have answered "YES" to interrogatory 11.

Louis H. Pollak

SPECIAL VERDICT FORM

INTERROGATORIES

NEGLIGENCE

1. Was the defendant negligent in failing to exercise reasonable care so as to adequately warn the plaintiff, before the date of the fire at Mount Airy Lodge, of the dangers and risks of harm associated with using the defendant's polyurethane foam insulation?

__X__ YES

_____ NO

(If your answer to No. 1 is yes, go on to No. 2)
(If your answer to No. 1 is no, go on to No. 6)

2. Was the defendant's negligence a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

__X__ NO

(If your answer to No. 2 is yes, go on to No. 3)
(If your answer to No. 2 is no, go on to No. 6)

3. Was the plaintiff negligent in subjecting its property to unreasonable and unforeseeable risks of harm in connection with its use of the defendant's polyurethane foam insulation?

_____ YES

_____ NO

(If your answer to No. 3 is yes, go on to No. 4)
(If your answer to No. 3 is no, go on to No. 6)

4. Was the plaintiff's negligence a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

_____ NO

(If your answer to No. 4 is yes, go on to No. 5)
(If your answer to No. 4 is no, go on to No. 6)

SPECIAL VERDICT FORM

5. (ANSWER ONLY IF YOUR ANSWERS TO NO. 1 AND NO. 4 ARE "YES")

Taking the combined negligence that was a substantial factor in bringing about the property damage and other losses sustained by the plaintiff as 100 percent, state in percentages the amount of negligence attributable to the plaintiff and the defendant:

Plaintiff _____ percent

Defendant_____ percent

(Go on to No. 6)

STRICT LIABILITY

6. At the time of sale to the plaintiff, was the defendant's polyurethane foam insulation in a defective condition in failing to be equipped with adequate warnings about the dangers and risks associated with using the defendant's product?

__X__ YES

_____ NO

(If your answer to No. 6 is yes, go on to No. 7)
(If your answer to No. 6 is no, go on to No. 9)

7. Was the defective condition of the defendant's polyurethane foam insulation a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

__X__ NO

(If your answer to No. 7 is yes, go on to No. 8)
(If your answer to No. 7 is no, go on to No. 9)

8. Did the plaintiff actually know and fully appreciate the nature and extent of the danger associated with the defendant's polyurethane foam insulation and, de-

spite having such an understanding, willingly choose to undertake the risks of using the defendant's product?

_____ YES

_____ NO

(Go on to No. 9)

MISREPRESENTATION

9. Did the defendant make misrepresentations to the public, including the plaintiff, about the character or quality of its polyurethane foam insulation which the average consumer would consider important in deciding whether to buy the defendant's product?

__X__ YES

_____ NO

(If your answer to No. 9 is yes, go to No. 10)
(If your answer to No. 9 is no, go to No. 12)

10. Did the defendant's misrepresentations influence the plaintiff in its decision to buy the defendant's product?

_____ YES

__X__ NO

(If your answer to No. 10 is yes, go to No. 11)
(If your answer to No. 10 is no, go to No. 12)

11. Was the plaintiff's reliance upon the defendant's misrepresentations a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

_____ NO

(Go on to No. 12)

SPECIAL VERDICT FORM

COMPENSATORY DAMAGES

12. State the amount of the property damage to the plaintiff's laundry building, machinery and equipment, the amount of the plaintiff's losses resulting from the damage to its towels, sheets, bedding and other linens, and the amount of the losses sustained by the plaintiff as a result of the interruption of its business, which were caused by the fire at Mount Airy Lodge.

$973,000

(Go to No. 13)

PUNITIVE DAMAGES

13. (a) Do you find that the plaintiff is entitled to punitive damages?

_____ YES
__X__ NO

(b) If your answer to No. 13(a) is yes, state the amount.

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PLAINTIFF'S PROPOSED INTERROGATORIES

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOUNT AIRY LODGE, INC., :
Plaintiff :
vs. : CIVIL ACTION NO. 79-4658
THE UPJOHN COMPANY, :
Defendant :

PLAINTIFF'S PROPOSED SPECIAL INTERROGATORIES

Plaintiff, by its attorneys, hereby submits the following special Interrogatories for the jury:

NEGLIGENCE

1. Was the defendant negligent in failing to exercise reasonable care so as to adequately warn the plaintiff, before the date of the fire at Mount Airy Lodge, of the dangers and risks of harm associated with using the defendant's polyurethane foam insulation?

_____ YES

_____ NO

(If your answer to No. 1 is yes, go on to No. 2)
(If your answer to No. 1 is no, go on to No. 6)

2. Was the defendant's negligence a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

_____ NO

(If your answer to No. 2 is yes, go on to No. 3)
(If your answer to No. 2 is no, go on to No. 6)

3. Was the plaintiff contributorily negligent in subjecting its property to unreasonable risks of harm which were foreseeable, understood and anticipated by the

plaintiff in connection with its use of the defendant's polyurethane foam insulation?

_____ YES

_____ NO

(If your answer to No. 3 is yes, go on to No. 4)
(If your answer to No. 3 is no, go on to No. 6)

4. Was the plaintiff's contributory negligence a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

_____ NO

(If your answer to No. 4 is yes, go on to No. 5)
(If your answer to No. 4 is no, go on to No. 6)

5. (Answer only if your answers to No. 3 and 4 are "yes")

Taking the combined negligence that was a substantial factor in bringing about the property damage and other losses sustained by the plaintiff as 100 percent, state in percentages the amount of negligence attributable to the plaintiff and to the defendant:

Plaintiff _____ percent

Defendant_____ percent

(Go on to No. 6)

STRICT PRODUCTS LIABILITY

6. At the time of sale to the plaintiff, was the defendant's polyurethane foam insulation in a defective condition in failing to be equipped with directions and warnings about the dangers and risks associated with using the defendant's product?

_____ YES

_____ NO

(If your answer to No. 6 is yes, go on to No. 7)
(If your answer to No. 6 is no, go on to No. 9)

PLAINTIFF'S PROPOSED INTERROGATORIES

7. Was the defective condition of the defendant's polyurethane foam insulation a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

_____ NO

(If your answer to No. 7 is yes, go on to No. 8)
(If your answer to No. 7 is no, go on to No. 9)

8. Did the plaintiff actually know and fully appreciate the nature and extent of the dangers associated with the defendant's polyurethane foam insulation and, despite having such an understanding, willingly choose to undertake the risks of using the defendant's product?

_____ YES

_____ NO

(Go on to No. 9)

MISREPRESENTATION

9. Did the defendant make misrepresentations to the public, including the plaintiff, about the character or quality of its polyurethane foam insulation which the average consumer would consider important in deciding whether to buy the defendant's product?

_____ YES

_____ NO

(If your answer to No. 9 is yes, go to No. 10)
(If your answer to No. 9 is no, go to No. 12)

10. Did the defendant's misrepresentations help to influence the plaintiff in its decision to buy the defendant's product?

_____ YES

_____ NO

(If your answer to No. 10 is yes, go to No. 11)
(If your answer to No. 10 is no, go to No. 12)

PLAINTIFF'S PROPOSED INTERROGATORIES

11. Was the plaintiff's reliance upon the defendant's misrepresentation or misrepresentations a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

_____ NO

(Go on to No. 12)

COMPENSATORY DAMAGES

12. State the amount of the property damage to the plaintiff's laundry building, machinery and equipment, and the amount of the losses sustained by the plaintiff as a result of the interruption of its business, which were caused by the fire at Mount Airy Lodge.

$725,000.00

13. State the amount of the plaintiff's losses resulting from the damage to its towels, sheets, bedding and other linens resulting from the fire at Mount Airy Lodge.

$_____

(Go on to No. 14)

PUNITIVE DAMAGES

14. State the amount of punitive damages, if any, to which the plaintiff is entitled as a result of the defendant's outrageous conduct.

$_____

VERDICT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOUNT AIRY LODGE, INC., Plaintiff	:	
vs.	:	CIVIL ACTION NO. 79-4658
THE UPJOHN COMPANY, Defendant	:	

Philadelphia, Pennsylvania
October 29, 1982

Before HONORABLE LOUIS H. POLLAK, J.,
and a jury.

VERDICT

VERDICT

(The jury returned with a verdict at 2:35 p.m., and Patrick J. O'Connor and James L. Fetterly, present for the plaintiff; Thomas M. Kittredge and David L. Harbaugh present for the defendant.)

THE COURT: I understand that you have arrived at a verdict.

Mr. Langevoort, do you want to read to us all your answers to the interrogatories?

Let's take No. 1.

JUROR NO. 6: Shall I read the question, or just yes or no?

THE COURT: Just yes or no.

JUROR NO. 6: No. 1 is yes.

THE COURT: And No. 2?

JUROR NO. 6: Is no.

THE COURT: So then you went on, I take it, to Question 6; is that correct?

JUROR NO. 6: That's correct. No. 6 is yes.

THE COURT: No. 6 is yes.

JUROR NO. 7: No. 7 is no.

THE COURT: So then you went on to Question No. 9.

JUROR NO. 6: No. 9 is yes.

THE COURT: Then No. 10.

JUROR NO. 6: No. 10 is no.

THE COURT: All right. So you did not go any farther.

JUROR NO. 6: That's right.

THE COURT: Is that correct?

JUROR NO. 6: That's correct.

THE COURT: All right. Let me ask your colleagues. Ms. McBride, you have heard Mr. Langevoort's recitals of the answers to the interrogatories. Are those your answers, too?

JUROR NO. 1: Yes, they are.

THE COURT: Ms. Fram?

JUROR NO. 2: Yes.

THE COURT: Those are your answers, too?

JUROR NO. 2: Yes.

THE COURT: Mr. Calabro?

JUROR NO. 3: Yes, your Honor.

THE COURT: Those are your answers, too?

JUROR NO. 3: Yes.

THE COURT: Mr. Jackson, are those your answers, too?

JUROR NO. 4: Yes, they are.

THE COURT: And Ms. Boccelli, those are your answers?

JUROR NO. 5: Yes.

THE COURT: I know they are yours, Mr. Langevoort. Mrs. Martin, are they your answers, too?

JUROR NO. 7: Yes.

THE COURT: Miss Lawryk? Are those your answers, too?

JUROR NO. 8: They are.

THE COURT: And Mrs. Rossi? Are those your answers?

JUROR NO. 9: Yes.

THE COURT: They are. All right, my friends, I think you have responded to the interrogatories, and I know that you have done so as the result of many, many hours and many, many days of devoted labor, and I am very, very grateful to you for myself and for all of my fellow judges of this court. You have given a great deal of time and a great deal of attention to these issues, and I thank you very much, and I'm sure I speak also for counsel and for the parties in thanking you for your attention and your devoted efforts.

It is of the nature of things that it is very hard in a litigation situation for both sides to prevail, and so in that sense, it may be that there are disappointments in the courtroom, but I think even those who are disappointed with the results recognize the attention and care which

you devoted to their concerns, and ultimately, that's centrally important to our process, that we all recognize that fairness has been done, and in that way, the values that we all are concerned about in this country prevail.

So I thank you, and I dismiss you now, and I wish you very well. I think I should tell you all that the inclusion of Mrs. Rossi, your alternate, as a permanent member of the jury is at least in my tenure, which is not very long, in this court, the first occasion that that has happened, and that was a splendid initiative. I am awfully glad we were able to keep you included in our cooperative work. Thank you all. You may go.

The record will show that the verdict as reflected in the interrogatories read by Mr. Langevoort is accepted by this Court, and so, pursuant to the verdict, a judgment will enter reflecting a judgment in favor of the defendant and against the plaintiff.

I thank you all for an extraordinarily well tried case and great personal pleasure to me to be involved with it. It really was.

EXCERPTS: POST-VERDICT CHAMBERS CONFERENCE

(A conference was held in the Court's chambers as follows:)

THE COURT: Well, Mr. O'Connor, Mr. Fetterly, do you want to tell us all why we are assembled?

MR. FETTERLY: Yes, your Honor. As we were lamenting amongst ourselves, Mr. O'Connor and I, outside — actually, I had gone back in the door — I was looking for Dwayne, or I can't remember what — two of the jurors came up to me and said, "Congratulations."

And I was obviously quite surprised to be congratulated after hearing what the verdict was, and immediately inquired of them why they would be congratulating me.

They advised me that they were of the impression that we had won the case, and we were there after advised by them — I called Mr. O'Connor in from outside — and they then advised us that every one of the jurors believed that we had won the case and couldn't understand why we would think otherwise.

And we then immediately came up and called this matter to the Court's attention. The Court advised us to call Mr. Kittredge's office. Mr. O'Connor undertook to do that. And the two young men apparently are waiting back in the juryroom.

The two young men, for the record, I don't recall their names, but they are the two younger fellows who were sitting in the first row.

THE COURT: Mr. Calabro and Mr. Jackson. I guess they are three and four.

MR. O'CONNOR: There was one other statement. I asked them — I said, "Are you certain that every other juror was under that impression, that we had won the case, in that amount?" And they said, "Yes."

Because another time we said, "Don't try to make us feel good. If that's not the case, fine, we'll get on with it." And they said, "No, that's the case."

EXCERPTS: POST-VERDICT CHAMBERS CONFERENCE

And we left it at that, and they came up and we said, "Would you be kind enough to come up to the court, because we want to bring this to the Court's attention."

EXCERPTS: JUROR JACKSON INTERROGATION

THE COURT: Did you and Mr. Calabro talk with some of the plaintiff's lawyers after that, do you remember? That Friday afternoon.

THE WITNESS: After we had left, we were on our way out the door, and Mr. Fetterly was on his way back. We were going out the doorway, toward Market Street side, and Mr. Fetterly was coming up the steps, and he asked us if we would mind if he asked us a question. So we said no. We figured the case was over and everything, there should be a problem with that.

So he asked us, "What did we do wrong?"

So I said, "I don't understand."

So he said — Well, I think he asked whether — why did we — how we reached the verdict that we did.

So we said, you know, we all came to that decision on what was presented.

So he said, "Well, what did we do wrong?"

I said, "What do you mean?"

He said, "Well, we didn't win. We didn't get anything."

So I was shocked and Steve was shocked, too, because I said, well, you know, "Didn't you get the $900,000?"

EXCERPTS: JUROR CALABRO INTERROGATION

THE COURT: Mr. Calabro, I want to ask you, as I just asked Mr. Jackson, about what happened, if you recall, right after the jury dispersed on the 29th of October, after you and your fellow jurors came in and gave your answers to the interrogatories.

Specifically, I wonder if you can recall and tell me whether you had any conversations with lawyers for the plaintiff, for Mount Airy Lodge, here in the neighborhood of the courthouse.

THE WITNESS: You want me to start answering now?

THE COURT: Yes.

THE WITNESS: You want me to tell exactly what happened?

THE COURT: Yes.

THE WITNESS: Well, after the jury dispersed, we left the courtroom, we took the elevator downstairs. Derrick wanted to go to the personnel office to apply for jobs. So me and him went there, and we did not know where the other jurors went. I guess they went home.

After that, we stayed there for a little while, in the personnel office, and we started proceeding out the lobby to the hallway to the door, Market Street door, and as we were going down the steps Mr. Fetterly was coming back up, and he approached us, and he just said, "Yo, guys, what happened?"

And I looked at Derrick, Derrick looked at me, and we said, you know, "What happened?"

He just said, "Well, like what happened?"

We said, "Well, we awarded you compensatory damages which was $973,000, but we didn't award you punitive damages. The jurors didn't feel we should award you punitive damages."

So he says, "Well, you know, we didn't get, you know, we didn't get a dime." He said, "We didn't get no money out of that at all. You know, we lost the case. You know, the defendant won the case."

EXCERPTS: JUROR CALABRO INTERROGATION

And I looked at Derrick. I was shocked. You know, we said that every juror in the courtroom thought that we gave them $973,000.

We left the courtroom thinking that we awarded the plaintiff $973,000, and after that we explained that to, well, after we were talking to Mr. Fetterly, he brought in Mr. O'Connor, and you know, he said, "Well, tell him what you just got done explaining to me."

So we told Mr. O'Connor.

So them two gentlemen said they were going to come up and see you, and they asked us if we would mind if we would come up and see you also and explain it to you, and that's what we did.

FOREMAN LANGEVOORT INTERROGATION

WILLIAM LANGEVOORT, having been duly sworn, was examined and testified as follows:

THE COURT: Mr. Langevoort, I am very happy to see you. I have asked you to come in this morning, Mr. Langevoort, because I have just a few questions which I would appreciate the opportunity of putting to you about the case of Mount Airy Lodge vs. Upjohn, and I'm sure you recall that I think just three weeks ago today, on the 29th of October, you and your fellow jurors came into court and reported answers to the various interrogatories which I had given to you and your fellow jurors to give answers to.

THE WITNESS: Yes.

THE COURT: Well now, I simply want to get a little bit of information about those answers. I have had you sworn, as Mr. Kaplan just swore you, because you know now from your experience as a juror it is important to have testimony under oath in a court proceeding.

THE WITNESS: Yes.

THE COURT: But please understand that I don't want you to feel any concern about these proceedings. It is important to get the truth, but I'm glad that we can be relaxed here in chambers and not have all the formality of the courtroom.

What I really want to get is simply your best recollection about a few matters.

THE WITNESS: I'll try.

THE COURT: And if you don't remember the answers to any questions I put, you just tell me so, and of course, if any questions that I put are confusing, which often happens when lawyers, including former lawyers who become judges put questions, you will let me know if anything is confusing.

THE WITNESS: Yes.

THE COURT: Good.

Now, basically, the questions that I want to put to you relate to the interrogatories which you reported the

answers to on behalf of the jury. I'm going to give you a document which I imagine you remember.

This is the document, Mr. Langevoort, which according to your court records is the one which I submitted to you and your fellow jurors, and which you had with you during your deliberations. The document is four pages which are captioned "Interrogatories."

They run from one to 13, and then stapled to them, on the top, is a covering memorandum from me to the jury called "Memorandum to the Jury Re: Attached Interrogatories."

I imagine you remember this document, don't you?

THE WITNESS: Yes, I do.

THE COURT: And this is, I believe, the very document which you brought back into court.

THE WITNESS: That's correct.

THE COURT: And reported on it, or what you reported as the jury's answers; is that correct?

THE WITNESS: That is correct.

THE COURT: All right. Now, Mr. Langevoort, if you will turn over the covering page and look with me at the first interrogatory, I will ask you this: Mr. Langevoort, would you look at the answer to Interrogatory No. 1 as recorded on the form? What answer is recorded there?

THE WITNESS: Yes.

THE COURT: Now, Mr. Langevoort, was that the answer on which the entire jury agreed?

THE WITNESS: Yes, it was.

THE COURT: Are you sure about that?

THE WITNESS: Well, this was a case of knowing that we would have to agree, or a majority would have to agree, so, or, we'd have to just stop at that point and just say, well, this was a hung jury. Now, I was elected, if I may digress a little from your question, foreman of the jury by having gone to the men's room, and when I came out I found out I was the foreman.

FOREMAN LANGEVOORT INTERROGATION

Now, the jury had decided that Thursday that we would not poll the jury to find out what their feelings were, and that we would look over the evidence and look into areas where individuals had questions, and we would spend the rest of the afternoon, and then on Friday morning we had decided that we would poll the jury as to what their feelings were.

Well, unfortunately, things got carried away a little and someone else polled the jury other than myself, and that upset me a little bit, but we did find out at that time that the jury felt that there was guilt on both sides, and that they could not give a firm yes or no to anything.

Then we went into the interrogatories and found out that we were going to have to answer pretty much as you pointed out in the courtroom that it was somewhat like a monopoly game where you went to a certain section, answered it, and if you answered that section, you went on to another. And we looked through and found out, well, if we went one route we could wind up in a certain answer, and going another route we would go into another answer.

We also realized that it had to be unanimous, and there were at times individual answers to the various segments — people who had felt as though they were on the other side of the fence. And it was the jury's contention then that what was sought or what they thought was expected of them, that it had to be unanimous, well, if it was a majority rule, that was the way it was going to be handled.

So we went by majority rule on each of the steps, with at the most one or two abstaining on their vote, and then perhaps even changing their vote, but we voted on each and every section.

Is that perhaps clear? Or —

THE COURT: Well, let me understand, then. Was the answer to Interrogatory No. 1, which you reported as yes that was the jury's answer?

THE WITNESS: Yes.

THE COURT: And are you saying that all of the jury agreed on that answer?

THE WITNESS: At that point, yes, when the vote was taken.

THE COURT: Now, if you would look with me, then, at Question 2. What answer do you see recorded there?

THE WITNESS: No.

THE COURT: Now, do you recall, Mr. Langevoort, whether that was the answer of the entire jury on Question No. 2?

THE WITNESS: As far as I can recall, yes, sir.

THE COURT: Now, what is the next interrogatory to which you have an answer on the form before you?

THE WITNESS: That would be under strict liability, No. 6, as the instructions had given us.

THE COURT: What answer do you have to Interrogatory 6?

THE WITNESS: I have yes.

THE COURT: And, Mr. Langevoort, to your best recollection, is that the answer of the entire jury to Answer No. 6?

THE WITNESS: Yes.

THE COURT: Now, Mr. Langevoort, the next interrogatory to which you have an answer is what?

THE WITNESS: Is no. No. 7.

THE COURT: No. 7. And you say the answer there is no?

THE WITNESS: That's correct.

THE COURT: Now, was that the answer of the entire jury to Interrogatory No. 7?

THE WITNESS: Yes.

THE COURT: It was?

THE WITNESS: It was.

THE COURT: All right. Now, the next interrogatory which the jury answered was which?

FOREMAN LANGEVOORT INTERROGATION

THE WITNESS: No. 9.

THE COURT: No. 9. And the answer as recorded on this form is what?

THE WITNESS: Is yes.

THE COURT: And was that the answer of the entire jury to Interrogatory No. 9?

THE WITNESS: Yes, it was.

THE COURT: Now, where do we go next on the form, Mr. Langevoort?

THE WITNESS: To No. 10.

THE COURT: No. 10. There the answer is what?

THE WITNESS: The answer is no.

THE COURT: Was that the answer of the entire jury as to Interrogatory 10?

THE WITNESS: Yes sir.

THE COURT: Now, Mr. Langevoort, I'm going to read you a very brief piece of dialogue between you and me on the day on which you reported these answers. This is the dialogue at least as Mr. Kaplan reported it, and I'll ask you whether you remember this.

This followed after you had reported the answer to Interrogatory No. 10.

Well, I'll go back to when I put the question to you about 10. I said, "Then No. 10."

And your, Mr. Langevoort, said, "No. 10 is no."

THE WITNESS: That's correct.

THE COURT: And then I said, "All right. So you did not go any farther?"

And you said, according to this transcript, "That's right."

And I said, "Is that correct?"

And you said, "That's correct."

THE WITNESS: At this point I misled you; is that correct?

THE COURT: Well, I don't know. This is the piece of conversation that I'm referring to.

Do you recall that, Mr. Langevoort?

THE WITNESS: Yes.

THE COURT: Now, why did you say that you misled me?

THE WITNESS: Well, I thought perhaps that you were referring to that's as far as you go in here, and you go to No. 13. We did go to No. 13, and that was not brought up at the time, and I felt perhaps you had a reason for this, but I wasn't going to stop proceedings to —

THE COURT: I see. All right.

Can you tell me, on the form, is that your answer to No. 13?

THE WITNESS: It is.

THE COURT: What is the answer that is there, Mr. Langevoort?

THE WITNESS: No.

THE COURT: And you wrote in that answer?

THE WITNESS: That's correct.

THE COURT: And on 13(b), what is placed there?

THE WITNESS: That's a zero.

THE COURT: Is that your zero?

THE WITNESS: That is correct.

THE COURT: And did the "no" under 13(a) reflect the answer of the entire jury?

THE WITNESS: After discussion, yes.

THE COURT: I see. And 13(b), the zero reflected the entire jury's verdict?

THE WITNESS: Yes.

THE COURT: Now, I understand that apparently you expected me to ask you about the interrogatories beyond 10?

THE WITNESS: That's correct.

THE COURT: You have told of your answer to 13. Did you discuss Interrogatory 12?

THE WITNESS: Yes, we did.

THE COURT: I see. Did you vote on 12?

THE WITNESS: It was not really voted, but it was assumed that in following from the rest of it that this

$973,000 was the award given to the plaintiff by the jury.

THE COURT: I see.

THE WITNESS: That was assumed.

THE COURT: And then you went on to 13?

THE WITNESS: Yes.

THE COURT: And the answers to 13(a) and 13(b) were the answers of the entire jury?

THE WITNESS: Yes.

THE COURT: Now if you go back with me for a moment, Mr. Langevoort, to Interrogatory 11, on your form I think there is no answer to Interrogatory 11.

THE WITNESS: That's correct.

THE COURT: And the jury didn't make any answer to Interrogatory 11?

THE WITNESS: No.

THE COURT: Let me take you back to the earlier interrogatories. Let's go back No. 3.

THE WITNESS: Yes.

THE COURT: I think there is no answer on your form to Interrogatory 3, is there?

THE WITNESS: No, there isn't.

THE COURT: And the jury didn't make any answer to Interrogatory No. 3?

THE WITNESS: No.

THE COURT: And when you turn to Interrogatory 4, again we have a blank. You have a blank, don't you, on your form?

THE WITNESS: That's correct.

THE COURT: And there again —

THE WITNESS: They did not —

THE COURT: The jury did not answer Interrogatory 4?

THE WITNESS: No, they did not.

THE COURT: And how about Interrogatory 5? Well I think again we have a blank.

THE WITNESS: Right, that is correct.

FOREMAN LANGEVOORT INTERROGATION

THE COURT: There again the jury didn't answer Interrogatory 5?

THE WITNESS: No, they hadn't.

THE COURT: And how about if we turn over to Interrogatory 8, where again I think there is a blank on your form?

THE WITNESS: That is correct, there was no voting on that section, either.

THE COURT: I see.

As I understand it then, there was no voting on Interrogatories 3, 4, 5, 8 and 11?

THE WITNESS: That's correct.

THE COURT: And why was there no voting on those interrogatories?

THE WITNESS: Because the — we were informed by the directions to follow into the categories that we had followed through.

THE COURT: All right. Now, Mr. Langevoort, I think I want to pause for a moment. This has been helpful. I'm not sure whether I'm going to ask you any further questions or not.

Do you mind stepping out here for a moment?

EXCERPTS: BENCH OPINION OF TRIAL COURT

THE COURT: Mr. O'Connor, I don't think we have an inconsistent verdict or an inconsistent set of interrogatories, as I understand the concept of inconsistency that is important for us here. Mr. Langevoort's testimony tells me that he, as the jury's agent and reporter, was telling the Court precisely what appears to be reflected on the interrogatories which relate to the three theories of liability, namely, that the jury found by its answers sets of facts what do not add up to liability on any one of the three theories of liability propounded, and I think Mr. Langevoort's testimony also discloses that the jury, he concurring, assumed that it was awarding the plaintiff $973,000 in compensatory damages. That assumption in my judgment is not an inconsistency with the meaning of the term as it generated this hearing today. That assumption in my judgment is a misapprehension by the jury of what the consequences in law were of the findings of fact made under Interrogatories 1 through 11. It may be regretable that the jury didn't better understand the consequences which are entailed in law of its factual findings, but that doesn't lead to an impunging of the factual determinations the jury made.

The predicate in my judgment for this morning's hearing was the possibility that what was reported by Mr. Langevoort in court and embodied in writing in the Answers to Interrogatories did not correspond with what the jury actually voted. To pursue that inquiry I conducted this hearing, insofar as it has reached Mr. Langevoort, in the face of defendant's position that any inquiry was foreclosed by Rule 606(b). I thought inquiry was permissible under the Weinstein and Burger dictum that the rule "would not bar testimony by a juror that all the jurors agree through inadvertence, oversight or mistake the verdict announced was not the verdict on which agreement had been reached."

I think what Mr. Langevoort has testified to in response to the questions I put forecloses a determination

EXCERPTS: BENCH OPINION OF TRIAL COURT

"that all the jurors agree that through inadvertence, oversight or mistake the verdict announced was not the verdict on which agreement had been reached."

Having reached that judgment, I don't think that further inquiry by me alone, or by me with counsel, into the deliberations of the jury would be proper.

I have asked Mr. Calabro and Mr. Jackson to come here this morning, and they are here, and I will interview each of them, but I will do so for the purpose of inquiring about their recollections, their individual recollections — I will interview them separately — of the conversations which were recorded in your affidavit, Mr. O'Connor, and in Mr. Bazdell's affidavit.

I think it is proper for the plaintiff to have Mr. Calabro's and Mr. Jackson's conversation with you rescued from the shadows of hearsay, but that unless something very surprising emerges in my interrogation of Mr. Calabro and Mr. Jackson about their conversations with you, Mr. O'Connor, and you, Mr. Fetterly, that in my judgment is as far as the interviews should go today.

So I'll now go to talk to those two jurors, and as presently disposed, I will not ask Mr. Langevoort any further questions. I will ask him to wait until I have concluded interviews with Calabro and Jackson and have reported back on that process to you, because I do want, if there is some further reason, as I am not now persuaded there is, if there is some further reason which emerges to ask Mr. Langevoort a question, I don't want him to be inaccessible. So if I can impose on your patience further, I will be back.

* * *

THE COURT: Well, we can infer that a reason for going on to 12 and 13 was because the interrogatory form so directed that pathway, that is to say, after 10 the form says, "If your answer to No. 10 is no, go to No. 12," and No. 12 directs the jury to go to No. 13.

EXCERPTS: BENCH OPINION OF TRIAL COURT

Those directives don't square with the covering memorandum and my instructions, and I think it's regretable that there was that disharmony. I don't find any basis in law for concluding that the jury's misapprehension as to whether it had authority to find damages against the defendant and in plaintiff's favor, having made responses under the various liability heads which did not lead to liability, is such an inconsistency as undercuts the vitality of the verdict as reflected in the several responses under the three liability captions.

In the same way, I don't think that the jury's confusion is salvagable if that confusion was generated in some part by the inconsistency between the directives on the verdict form and what was told to the jury in the covering memorandum and my charge.

All of it adds up to a jury perceiving that the law would reach a result on the basis of what the jury had determined as to the underlying facts which generated the liability or non-liability when the law properly understood leads in a different direction. It is not the jury's responsibility to answer questions of law. That's up to the Court with the assistance of counsel.

So I remain of the view, though I will keep my mind open on the matter until I have finished talking to Mr. Calabro and Mr. Jackson, that there is nothing further that should be put to Mr. Langevoort.

* * *

THE COURT: Well, I think I should not. I think what we have here is a situation in which on the basis of the testimony of the three jurors Mr. Langevoort, Mr. Calabro and Mr. Jackson — prima facie the entire jury assumed that they were reporting a verdict in the plaintiff's favor in the amount of $973,000. I say prima facie. To establish that with assurance one would have to interview the other six jurors. I don't propose to interview

EXCERPTS: BENCH OPINION OF TRIAL COURT

the other six jurors, nor do I propose to ask further questions of Mr. Calabro and Mr. Jackson along the lines, Mr. O'Connor, which you and Mr. Fetterly have submitted both on paper and orally this morning for the reason that Mr. Langevoort's testimony establishes there is not unanimous jury agreement or that the answers reported by Mr. Langevoort on Interrogatories 1 through 11 are inaccurate in any respect. Mr. Langevoort's testimony by itself precludes any finding that all 9 jurors would agree there was an error of a clerical nature in reporting what the jury had determined as to any one of the three theories of liability.

Under those circumstances, I conclude that the jury has found adversely to the plaintiff on each of the three theories of liability; no finding of damages in plaintiff's favor can properly be made in law in a setting in which the jury has found adversely to plaintiff on each of the three asserted liability theories.

With Mr. Langevoort's testimony in that posture, generating the conclusions which it seems to me are required by that testimony, taken together with the report made in open court by Mr. Langevoort on October 29, and acquiesced in by all of his colleagues, I find no tenable ground for any further inquiry of Mr. Langevoort, Mr. Calabro, Mr. Jackson, or any of the six other jurors who were not summoned today.

Moreover, I conclude that it is now my duty to enter judgment on defendant's behalf and against plaintiff. That was what I announced I was going to do on October 29 when the jury came in and through Mr. Langevoort reported its responses.

I decided to hold in suspense the entry of that judgment when on October 29 Mr. Fetterly and Mr. O'Connor in chambers reported on the record their conversations with Mr. Calabro and Mr. Jackson. We have now gone through a form of inquiry far more extensive than defendant thinks remotely justifiable, and far less exten-

sive than plaintiff thinks is required. It is an inquiry which leads me to the conclusion, for the reasons stated, that the time has has now come to enter judgment against plaintiff, Mount Airy Lodge, and in favor of Upjohn, and that is what I shall do this afternoon.